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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1889

ESTATE OF LEONARD E. WHITLOCK, DECEASED
GEORGIA M. WHITLOCK, EXECUTRIX, AND
GEORGIA M. WHITLOCK,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITIONERS' BRIEF IN REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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Petitioners file this reply to that part of respondent's brief in opposition to petition for certiorari which deals with point a. (page 9 of petition), concerning interpretation of Section 951(d) IRC 1954, point k. (page 18 of petition), concerning the application of Section 951 (a) (1) (B) IRC 1954 to earnings of Oil Services accumulated during 1962 and prior years, and point n. (page 20 of petition), the constitutional issue.

With reference to point a., the correct interpretation of Section 951(d) IRC 1954, the 10th Circuit panel and the respondent both assume that the combined House and Senate did not know the meaning of Section 951(d) when the section was inserted in the law. It is submitted that the Senate, which originated the wording of Section 951(d), was fully aware that there were differences between its

views and those of the House (see the views of the Senate set out in Hearings on H.R. 10650 before Senate Finance Committee, part 2, pages 561-562, part 7, pages 3174-3176, 3282-3283, part 11, pages 4893-4894), and that these differences with respect to Section 951(d) were resolved by the Senate, in part, by the adoption of the present wording of Section 951(d). The technical explanation of the Senate's action is set out in 1962 C.B. 3, page 944, in the following language by the Senate:

> "(d) Coordination with foreign personal holding company provisions.—Subsection (d) provides that a United States shareholder who, for a taxable year, is subject to tax under section 551(b) (relating to foreign personal holding company income included in gross income of United States shareholders) on income of a controlled foreign corporation is not required to include in gross income, for such taxable year *any amount* under subsection (a) with respect to such company. The corresponding provision of the bill as passed by the House (sec. 13(b)(1)) amended section 551(b) to provide that the amount of undistributed foreign personal holding company income otherwise required under section 551(b) to be included in gross income of a United States person is reduced by his proportionate share of undistributed foreign personal holding company income included in gross income under section 951(a) for the taxable year as his proportionate share of subpart F income of such controlled foreign corporation." (Emphasis added)

The above was a part of revisions to the provisions of H.R. 10650 related to controlled foreign corporations. The Committee of Conference of the two Houses concerning the different versions of the House and Senate of H.R. 10650 issued a report No. 2508 on October 1, 1962, on the dis-

agreeing votes of the two Houses on the amendments of the Senate to H.R. 10650, of which the amendment related to controlled foreign corporations was Amendment No. 126 (see record before U.S.C.A. 10, Appendix, pp. 1 through 136, particularly pp. 139 and 140). This report is found at 1962 C.B. 3, p. 1129 and following. In the Statement of the Managers on the Part of the House, at l.c. 1157 of 1962 C.B. 3, it is stated:

> "Amendment No. 126: The bill as passed by the House added a new subpart F to part III of subchapter N of chapter 1 of the code (relating to income from sources without the United States). The new subpart F (relating to controlled foreign corporations) provided rules under which a United States person who owns stock in a controlled foreign corporation would be required to include in his gross income a pro rata share of certain portions of the controlled foreign corporation's income. Senate amendment No. 126 struck out these provisions of the bill as passed by the House and inserted new text in the nature of a substitute which adds a new subpart F (relating to controlled foreign corporations). Under the conference agreement, the House recedes with amendments, which, except as discussed below in paragraph (m) relating to receipt of minimum distributions, are either technical or clerical. The more important differences between the bill as passed by the House and the Senate amendment as agreed to in conference are explained below."

It is thus apparent that the House of Representatives was aware of the differences between the House and Senate versions of Section 951, with relation to Section 951(d) IRC 1954, and that the House receded from its version and agreed to the Senate version after giving due consideration

to same. Therefore, it cannot be said that the combined House and Senate were unaware of the impact of Section 951(d) as finally enacted.

With reference to point k. (page 20 of petition), the 10th Circuit panel has erroneously applied Section 951(a)(1)(B) IRC 1954 to earnings of Oil Services accumulated during 1962 and prior years. It erroneously stated in its opinion (page A 56 of petition) that "this holding is consistent with the treatment of dividends if distributed. We find no basis for any other construction, *and no legislative history to suggest it.*" The 10th Circuit panel was in error in so stating, since the attention of the panel was called, as has the attention of the Supreme Court been called at page 18 of petition, to House Ways and Means Committee Report #1447 to accompany H.R. 10650 found in 1962 C.B. 3, pp. 405, 461-468, at l.c. 467 wherein the Ways and Means Committee Report stated:

> "Since the concept here is merely to tax to the U.S. shareholders the earnings and profits of the corporation since the end of 1962, the investments in nonqualified property taken into account are only those which are in excess of earnings and profits accumulated in taxable years beginning after December 31, 1962."

Further, in House Ways and Means Committee Report #1447 to accompany H.R. 10650 (1962) C.B. 3, pp. 405 et sequitur, Technical Explanation of the Bill, page 588, it is stated:

> "Subpart F income may not exceed the earnings and profits for the taxable year (computed without reduction for distributions made during that year). The increase in investment in nonqualified property, however, is limited to the sum of earnings and profits

> for the taxable year (computed without reduction for distributions made during that year) plus the earnings and profits accumulated for prior taxable years *beginning after December 31, 1962.*"

The respondent seeks to argue that there is no provision in Section 951(a)(1)(B) IRC 1954 which specifically forbids the use of earnings and profits accumulated by Oil Services prior to 1963 in determining the thrust of Section 951(a)(1)(B). Both respondent and the 10th Circuit panel depart from the exact wording of Section 951(d) to refute petitioners on the main issue, while refusing to depart from the inexact wording of Section 951(a)(1)(B) relating to the earnings issue, again to refute taxpayers. Such procedure is unauthorized under the doctrine of this Court in *Harrison* v. *Northern Trust Company,* 317 U.S. 476, 63 S.Ct. 361, wherein this Court teaches that:

> "But words are inexact tools at best and for that reason there is wisely no rule of law forbidding resort to explanatory legislative history no matter how 'clear the words may appear on superficial examination.' United States v. American Trucking Assos. 310 U.S. 534, 543, * * * 60 S.Ct. 1034 * * *."

In short, petitioners request the Supreme Court to exercise the same consistency that petitioners asked for, but did not receive, from the 10th Circuit panel, i.e., if the plain wording of Section 951(d) is to be departed from, then the Court should consider the legislative history of Section 951(d) as the Tax Court did, and also consider the meaning of the not so clear wording of Section 951(a)(1)(B) on the earnings issue, by examining the legislative history of the earnings question above.

In addition, with reference to point n. (page 20 of petition), petitioners reply to that part of respondent's

brief in opposition to petition for certiorari dealing with point n., the constitutional issue. Petitioners note that the separate views of the Republicans on H.R. 10650 set out in House Committee Report #1447 to accompany H.R. 10650, found in 1962, C.B. 3, page 671 et sequitur, l.c. 687 (signed by Messrs. Noah M. Mason, John W. Byrnes, Howard H. Baker, Thomas B. Curtis, Victor A. Knox, James B. Utt, Jackson E. Betts, Bruce Alger, Steven B. Derounian, and Herman T. Schneebell), state:

> "TAX ON CONTROLLED FOREIGN CORPORATION UNCONSTITUTIONAL
>
> Section 13 of the bill has little relation to possible evasion or avoidance of U.S. tax, but is admittedly designed to reduce foreign investment. The constitutionality of this taxation of American shareholders is open to serious question. In fact, counsel for the Joint Committee on Internal Revenue Taxation has advised the committee that Congress cannot constitutionally tax shareholders on the undistributed income of foreign corporations, except in cases where such taxation is reasonably necessary to prevent evasion or avoidance of tax (Hearings before the Committee on Ways and Means, 87th Cong., 1st sess., on 'The Tax Recommendations of the President,' Apr. 20, 1961, vol. 1, pp. 311-313). The settlement of this question will produce long and costly litigation. Neither taxpayers nor the Government will know for years whether this unprecedented experiment in tax jurisdiction will be sustained by the courts."

Additionally, the respondent's brief in opposition as well as the 10th Circuit panel's decision, address themselves primarily to the constitutionality of a tax on *current year to year earnings of Oil Services*, as distinguished from

a tax on the earnings accumulated *prior to January 1, 1963*, which latter type situation is the type situation involved in *Eisner* v. *Macomber*, 252 U.S. 189, 78 S.Ct. 1033, and are thus not responsive to petitioner's argument on the constitutional issue here with reference to attempt to tax pre-1963 earnings.

CONCLUSION

WHEREFORE, petitioners again move this Court to grant Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit as requested.

Respectfully submitted,

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